PP

v.

MSIMANGA LESALY & ANOR

HIGH COURT MALAYA, ALOR SETAR
MOHD HISHAMUDIN J
[CRIMINAL TRIAL NO: 45-11-97]
31 DECEMBER 1999

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 37A - Admissibility of statements in evidence - Caution administered to both accused jointly - Whether valid - Whether statements made admissible*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 37A - Admissibility of statements in evidence - Whether accused understood caution - Whether statements made admissible - Adducement of statements by defence - Whether caution necessary*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 37(da)(i) - Presumption - Trafficking in heroin - Whether rebutted - Whether proved beyond reasonable doubt*

WORDS & PHRASES: *"in transit" - Dangerous Drugs Act 1952, s. 2 - Whether dangerous drug brought into country "for the sole purpose of being carried to" another country*

The 1st and 2nd accused who were travelling together were jointly charged for trafficking in heroin, an offence punishable by death under s. 39(B) of the Dangerous Drugs Act 1952 ('DDA'). They were caught at the Malaysian customs checkpoint at the Malaysian-Thai border upon discovery of the said drug on the 1st accused. Both were administered an oral caution jointly under s. 37(A) DDA upon arrest.

The 1st accused sought to tender two cautioned statements made by her and which sought to implicate the 2nd accused, *ie*, an oral one made upon arrest and a written one made four days after her arrest. The 2nd accused objected on the grounds, *inter alia*, that the written cautioned statement could not be admitted as it disclosed that the 1st accused did not understand the English Language. Further, the said statements were inadmissible by virtue of para (b) of the proviso to sub-s. (1) s. 37A DDA. Against this, the 1st accused submitted that no caution was necessary since it was the defence and not the prosecution that sought to adduce the statements. Apart from the above, the 1st accused contended that she should be charged under s. 21(6) DDA as she was in transit to Indonesia.

Held:

[1] The oral caution administered to both the accused was not valid. This was because the caution was not administered to the two accused separately but was administered only once and jointly to both of them. As the caution was not valid, all statements made by both accused after the caution were not admissible by reason of para (b) to the proviso of sub-s. (1) of s. 37(A) DDA.

[2] As it was the 1st accused that sought to adduce the written cautioned statement, the onus was upon her to satisfy the court on a balance of probabilities that she understood the English language. There was a serious doubt as to whether she understood the caution read to her as her command of the English language was glaringly very poor. Despite the language difficulty, there was nothing on record to show that the caution was ever explained to her. Although as a general rule it is not necessary to explain the caution, in special circumstances, however, the caution must be explained. The written cautioned statement was therefore inadmissible.

[3] Section 37A DDA does not require the caution to be administered each time an arrested person is about to or has made a statement. The caution is to be given only once except in a situation where the arrested person is released after the caution but is rearrested later in which case there has to be a fresh caution. However, there is nothing wrong for the competent officer, at a subsequent occasion, should the need to record a further statement arises, to adopt an extra cautious approach by administering the caution again to the arrested person as in the instant case.

[4] It was immaterial that it was the defence that sought to introduce the statements or that the statements were relevant for the purpose of the defence of the 1st accused. Paragraph (b) of the proviso to sub-s. (1) of s. 37(A) makes no distinction as to which party (be it the prosecution or the defence) that seeks to adduce the statement or between statements prejudicial to the accused and favourable to the accused.

[5] The prosecution had failed to make out a *prima facie* case against the 2nd accused. There was insufficient evidence to show common intention. However, there was *prima facie* evidence that the 1st accused was found to be in possession of the heroin found in her slippers and on her body. Thus, the presumption under s. 37(da)(i) DDA applied.

[6] Based on the definition of "in transit" in s. 2 DDA, it was incumbent upon the 1st accused to convince the court that the heroin found was "for the sole purpose of being carried" to Indonesia. There was hardly any evidence to show that the heroin was brought into Malaysia for the sole purpose of being carried to Indonesia.

[7] The 1st accused could have either (a) conceded that she was in possession of the heroin, and then sought to rebut the presumption of trafficking; or, alternatively, (b) denied to be in possession of the drug, *ie*, to challenge the very foundation of the said presumption of law. If (a) was the nature of the defence, she had to rebut the presumption on a balance of probabilities. However, if (b) was the case, she needed only to raise a reasonable doubt.

[7a] The 1st accused sought to show that she was never in possession of the heroin for she claimed that although the heroin was found in her slippers and on her body, she was not aware that the slippers contained the drug nor was she aware that the packages found on her body contained the same for she thought that they were shaving powder. Her defence was in the nature of (b) above. As she failed to cast a reasonable doubt against the prosecution case, she was found guilty and should therefore be convicted.

[1st accused sentenced to death; 2nd accused acquitted and discharged.]

Case(s) referred to:
Lee Lian & Ors. v. PP [1956] MLJ 191 ***(refd)***
Lim Kah Wan v. PP [1985] 2 CLJ 473 ***(refd)***
Mohamed Yusof v. PP [1983] 2 MLJ 167 ***(refd)***
Muhamed Hassan v. PP [1998] 2 CLJ 170 ***(refd)***
PP v. Aidil Ma'rof [1992] 2 CLJ 1239 ***(refd)***
PP v. David Ackowuah Bonsu [1999] 2 CLJ 677 ***(refd)***
PP v. Lin Lian Chen [1991] 1 MLJ 316 ***(refd)***
PP v. Jorge Enrique Pedlow Tellow [1998] 4 CLJ 278 ***(refd)***
PP v. Kang Choo Heng and Anor [1991] 3 CLJ 2574 ***(refd)***
Yong Su Wan v. PP [1998] 3 CLJ 419 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 21(6), 37(da)(i), 37A(1)(b), 39B(2)
Evidence Act 1950, s. 138(2)
Penal Code, s. 34

For the prosecution - Alauddeen Ismail, DPP
For the 1st accused - Shanmugaiah
For the 2nd accused - Karpal Singh (Jagdeep Singh Deo with him)

Reported by Usha Thiagarajah

JUDGMENT

Mohd Hishamudin J:

The first accused (Msimanga) was a coloured African woman, while the second accused (Molefe) was a coloured African man. Both were holders of passports issued by the Republic of South Africa. They were jointly charged for trafficking in heroin, a very serious offence punishable by death under s. 39B(2) of the Dangerous Drugs Act 1952 (the "DDA"). The charge reads:

> Bahawa kamu bersama-sama pada 7hb Mei 1997 jam lebih kurang 4.30 petang di Pejabat Pencegah, Kastam dan Eksais Diraja Malaysia, Kompleks Imigresen Bukit Kayu Hitam dalam daerah Kubang Pasu, dalam negeri Kedah Darul Aman dengan niat bersama, telah mengedar dadah berbahaya, iaitu, heroin seberat 686.3 gram dan oleh itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a), Akta Dadah Berbahaya 1952 (disemak 1980) dan boleh dihukum di bawah seksyen 39B(2), Akta yang sama yang dibaca dengan seksyen 34 Kanun Keseksaan.

For the prosecution, a taxi driver, Soh Lim Sun (PW2), gave evidence that the two accused boarded his taxi at Haadyai (Thailand) for a journey to Penang. Apart from them, he had two other passengers on board that trip - a Thai and a Malaysian. Both accused sat at the back seat. On arrival at the Malaysian customs checkpoint at the Bukit Kayu Hitam Immigration Complex, at the Malaysian-Thai border, all the four passengers alighted for the purpose of immigration and customs clearance.

Prosecution witness, customs officer Shashitaran a/l Marimuthu (PW4) testified that on the morning of 7 May 1997 he was on duty at the customs checkpoint. At approximately 4.20 p.m. he stopped PW2's car, examined the travel documents of both the accused, who were passengers in the car, and instructed them to proceed to the drug detection unit office where he inspected their bags. Having inspected the bags and found nothing suspicious in them, he asked the first accused to take off both her slippers. He examined them and found the slippers to be rather heavy. So he took both the accused to the customs prevention office where he informed customs superintendent Saidi bin Ismail (PW6) that he had some suspicion about the slippers. PW6 instructed PW4 to probe the slippers with a probe needle. The latter did so and the result was they discovered that the slippers a white powdery substance imbedded inside them. Both slippers were then slit opened. The right side slipper was found to have contained four packages, while the left side was found to have contained two packages.

PW6, who was also the investigating officer in the present case, testified that when he saw the white powdery substance, which he considered to be an

incriminating object, he then asked both the accused whether they understood English, and they nodded their heads. He then administered the caution under s. 37A(1) of the DDA. The caution was read by PW6 from a card that reads:

> It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say whether in answer to a question or not may be given in evidence.

The caution was not read to each of the accused separately but was addressed to both of them jointly. The first accused reacted by saying, in English,

> I don't know.

She then pointed her finger to the second accused and uttered the words,

> Taichu! Taichu!

The latter raised his hands up and responded, also in English,

> I don't know.

At this juncture, I pause to remark that the prosecution did not seek to establish as to what language the word "taichu" belongs to as well as its meaning. The first accused spoke the Yoruba language, but the Yoruba language interpreter engaged by the court for the purpose of the trial confirmed that it was not a Yoruba word. However, PW6, in cross-examination by counsel for the first accused (Encik Shanmugaiah), said that he went to Thailand to find out the meaning of that word and was told by a Thai businessman (it baffles me as to why this witness went all the way to Thailand just to consult a businessman and not a language expert) in Danok, Thailand, that "taichu" is a Chinese word and it means "towkay". The said businessman was not called to confirm this. Following an objection by the counsel for the second accused (Encik Karpal Singh), I ruled that the evidence of the witness as to the meaning of the word was inadmissible on the ground of it being hearsay.

At the end of the case for the prosecution, after hearing the submissions, I ruled that the above oral caution administered by PW6 to the first and second accused was procedurally improper and was thus not valid. But I shall deal with this issue later when I discuss the submissions. For the moment, I shall, in the next paragraph, deal with another cautioned statement – this time a written one – administered by another customs officer (DW3) to the first accused a few days after the date of the arrest.

In the course of cross-examining PW6, the learned counsel for the first accused sought to tender through this witness, as the investigating officer, a written cautioned statement (ID19) made by the first accused to a customs

superintendent, namely, Encik Balasupramanian (DW3) at about 11.35 a.m. on 11 May 1997 (that is, four days after the arrest). *PP v. Lin Lian Chen* [1991] 1 MLJ 316 was referred to. The learned counsel for the second accused, Encik Karpal Singh, however, again objected on the grounds that the cautioned statement, which was recorded in English, disclosed that the first accused did not understand the English language as indicated by the answers given by her to specific questions asked by the recording officer. The questions and answers were as follows:

Q: Do you understand the language I speak?

A: Small, small.

Q: Do you understand the caution I have read to you?

A: O. K.

Further, at the end of her statement she stated:

I find what to recorded as true.

The basis of Encik Karpal's objection is s. 37A of the DDA, in particular, para. (b) of the proviso to sub-s. (1) of that section. I shall set out here the relevant provision of s. 37A. It states as follows:

37A. Admission of statement in evidence.

(1) Where any person is charged with any offence against this Act any statement, whether such statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after such person is charged and whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions, by such person to or in the hearing of any police officer of or above the rank of Inspector or any senior officer of customs or any other person concerned or not in the arrest, shall notwithstanding anything to the contrary contained in any written law, be admissible at his trial in evidence and, if such person tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit.

Provided that no such statement shall be admissible or used as aforesaid –

(a) if the making of the statement appears to the Court to have been caused by any inducement, threat or a promise having reference to the charge against such person, proceeding from a person in authority and sufficient in the opinion of the Court to give such person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him; or

(b) in the case of a statement made by such person after his arrest, unless the Court is satisfied that a caution was administered to him in the following words or words to the like effect –

> It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say whether in answer to a question or not may be given in evidence.

> Provided that a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been given if it has been given as soon as possible.

As it was the first accused that sought to adduce the cautioned statement, the onus was on the defence to satisfy the court on a balance of probabilities that she understood the English language. The defence need not have to prove that the accused was proficient in, or had a good command of, the English language. The court is not interested in the niceties of English grammar. To my mind, the defence need only to show to the court that she had the ability to speak simple English and that her level of understanding of the language was sufficient enough to enable her to express herself with a reasonable degree of clarity so as to be understood. But, more important, the court must be satisfied that the level of command of the language was such that she really understood the caution that was administered to her by the recording officer. Now, from the above answers given by the first accused, and given the peculiar circumstances of the present case, I think there is substance in the objection by the learned counsel, Encik Karpal. In my judgment, her command of the English was, glaringly, very poor and, in particular, I have very serious doubt if she really understood the caution. To compound the problem, despite the language difficulty, there was nothing on record to show that the caution was ever explained to her. Although as a general rule it is not necessary to explain the caution, in special circumstances, however, the caution must be explained (*Mohamed Yusof v. PP* [1983] 2 MLJ 167; and *PP v. Aidil bin Ma'rof* [1992] 2 CLJ 1239). And I consider the present case to be exceptional in view of the fact that the accused had very poor understanding of the English language.

Now, what I mean by the peculiar circumstances of the case is the fact that prior to the commencement of the actual trial, this court, as well as Encik Shanmugaiah (the counsel for the first accused), has had great difficulty in communicating with the first accused. She had informed the court that she could only speak "broken English" and, indeed, through her counsel had insisted in speaking in Yoruba for the purpose of the trial and had requested that she be provided with an interpreter proficient in the Yoruba language, one of the languages spoken in Nigeria, which she claimed to be the language

she was conversant with. Only after some difficulties – and not without some delay – that this court was able to obtain the services of one Encik Nurudeen, a postgraduate law student from Nigeria studying at the International Islamic University, Malaysia, who was conversant in the Yoruba language and who had kindly agreed to act as interpreter. These are factors that I believe this court is entitled to take into account in making the aforesaid findings. Accordingly, I ruled the written cautioned statement inadmissible.

In the course of cross-examining PW6, learned counsel for the first accused (Encik Shanmugaiah) also sought to put the following three questions/ suggestions to the witness:

[1] Q: Did the first accused make a statement to you to the effect that the second accused was taking her to Indonesia to buy cheap baby dress? This statement was not made immediately after the oral caution, but was made subsequent to [a day after] the caution but before the accused (1) was charged in court.

[2] Q: I put it to you that accused (1) told you that the accused (2) would buy an air ticket for her and make travel arrangements to go to Indonesia. You were told about this on a different day after the date of arrest.

[3] Q: A day after the oral caution, accused (1) told you that accused (2) asked her to carry the paper bag containing 5 packages. When accused (1) asked accused (2) what they were in the five packages, accused (2) told her that they were shaving powder. Then accused (1) further said to you that she wanted to put the 5 packages in her bag but the accused (2) told her that there were many thieves in Indonesia, so put them on your body. Accused (1) also told you that accused (2) gave her a pair of slippers for her to wear and to take to Indonesia to do sample.

The learned counsel for the second accused (Encik Karpal) objected to each of these questions/suggestions on the grounds that through these questions/ suggestions Encik Shanmugaiah was attempting to adduce statements made by the first accused to PW6 while under arrest. Again invoking para. (b) of the proviso to sub-s. (1) of s. 37A of the DDA, Encik Karpal argued that there must first be evidence of a caution having been administered to the first accused. Since there was no such caution, the statements were inadmissible. The learned counsel for the first accused (Encik Shanmugaiah), on the other hand, while neither denying his intention nor disputing that the first accused was under arrest, submitted that legally no caution was necessary since it was the defence, and not the prosecution, that was seeking to adduce the statements; and, moreover, such statements, if admitted, would not be prejudicial to the first accused. He further argued that the statements were relevant for the

purpose of the defence of the first accused, citing s. 138(2) of the Evidence Act which states:

> (2) The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

I upheld Encik Karpal's objection and disallowed the questions/suggestions. At the trial I gave my reason for upholding the objection. I opined then that, although there was an earlier oral caution by PW6, still, as a matter of law, there had to be a fresh caution since the alleged statements sought to be adduced were not made immediately or some time soon after the oral caution but was made on a later occasion, that is, the following day. In the course of writing this judgment, upon reflection, I think, although the ruling I had made (in upholding the objection and disallowing the questions/suggestions) was right in law, my reasoning (that there had to be a fresh caution) was erroneous. I believe I was wrong in my reasoning because, upon close examination of s. 37A of the DDA, I observe that there is nothing in this provision that requires the caution to be administered each time an arrested person is about to or has made a statement. In my view, the section requires the caution to be given only once. Once a caution has been administered by a competent officer, any statement made by the arrested person thereafter, regardless whether immediately after the caution or at some other time later, would be admissible, except in a situation where, after the caution, he was released but rearrested later, in which case there has to be a fresh caution. Of course, legally, there is nothing wrong for the competent officer (or any other competent officer), at a subsequent occasion, should the need to record a further statement arises, to adopt an extra cautious approach by administering the caution again to the arrested person – as was done by DW3 in the instant case.

Anyhow, as I have just said, I believe that my ruling in upholding the objection (and to disallow the questions/suggestions) was correct in law. I say so because, in my judgment, the earlier oral caution that was given by PW6 was, in any case, not valid (I shall give my reason why it was not valid shortly). Now, since the oral caution was not valid, it follows then the statements allegedly made by the first accused, after the caution, would not be admissible as she was then already under arrest. It is immaterial that it was the defence that sought to introduce the statements. It is also immaterial that such statements were relevant for the purpose of the defence of the first accused. For it is quite plain that the word "statement" in para. (b) of the proviso to sub-s. (1) of s. 37A refers to the "statement" in the expression –

> …any **statement**, whether such **statement** amounts to a confession or not…[Underlining is mine.]

appearing in sub-s. (1) of s. 37A, and this expression is, to my mind, so wide so as to include any statement that is relevant for the purpose of the defence of the accused in question. Indeed, the expression encompasses statements of **any** kind or nature whatsoever, without exceptions. In other words, para. (b) of the proviso to sub-s. (1) of s. 37A makes no distinction as to which party (be it the prosecution or the defence) that seeks to adduce the statement; or between statements prejudicial to the accused and statements favourable to the accused. It is also my view that s. 138(2) of the Evidence Act has no bearing on the issue at hand.

Now back to the facts. After PW6 had taken photographs of the two accused, he directed woman customs officer Norhayati Bt. Amir Hamzah (PW7) and another woman officer to conduct a body search on the first accused. PW7 said in evidence that the first accused was wearing a long dress. PW7 asked her to lift her dress and, when she did so, PW7 discovered underneath the dress two black packages tucked to the left and right side of her waist. Then the first accused uttered the following words:

> That man! That man!

At the same time she pointed to the door of the room in which the body search was conducted. PW7 further testified that underneath the dress, the first accused wore two pairs of tight aerobic shorts, one worn on top of the other. The outer layer was purple in colour while the inner was black. Upon examination, PW7 discovered three more packages, oval in shape, tucked inside the shorts.

The pair of slippers together with the packages found in them and the five packages found on the body of the first accused were sent to the Government chemist (PW1) who analysed them and confirmed that they contained 686.3 grams of heroin.

At the close of the case for the prosecution, after having given due consideration to the evidence and submissions, I was satisfied that –

(1) the prosecution had failed make out a *prima facie* case against the second accused, Molefe (I found that there was insufficient evidence to link him to the heroin found in the slippers and on the body of the first accused; hence, there was insufficient evidence to show common intention); but

(2) succeeded in establishing a *prima facie* case against the first accused, Msimanga.

The second accused (Molefe) was accordingly acquitted and discharged while the first accused (Msimanga) was called upon to enter her defence (the charge was amended to remove the element of "jointly" as well as the reference to s. 34 of the Penal Code).

In submitting that there was a *prima facie* case, the learned deputy public prosecutor, Encik Alaudeen, impressed upon the court that in view of the Federal Court's decision in *Muhamed Hassan v. PP* [1998] 2 CLJ 170, he was not relying on the presumption under s. 37(d) of the DDA, but instead he sought to prove by evidence that both the accused were found to be in possession of the heroin and thereafter to urge the court to invoke the presumption under s. 37(da)(i) of the DDA which provides that –

> (da) any person who is found in possession of –
>
> (i) 15 grammes or more in weight of heroin;
>
> …
>
> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug.

I am satisfied that there is *prima facie* evidence that the first accused was found to be in possession of the heroin found in the slippers and on her body. The cunning manner in which the packages of heroin were concealed in her slippers and underneath her dress and tights indicates that she had knowledge of the heroin. Thus the presumption under s. 37(da)(i) applies.

In the course of the submissions at the close of the case for the prosecution, the following issue was raised: was the oral caution administered to both the accused by PW6 (that is the oral caution that he read from a card) at the Customs Prevention Office on 7 May 1997 legally proper and valid? I ruled that it was not valid on the ground that the caution was not administered to the two accused separately but was administered only once and jointly to both of them (*PP v. Kang Choo Heng and Anor* [1991] 3 CLJ 2574). In my opinion, where more than one arrested persons are involved (it would appear that the two were under constructive arrest immediately after the probe needle showed that the slippers contained a white powdery substance), the caution must be administered separately to each of them. Now, if the caution was not valid, then it follows that all statements made by both the accused before or within the hearing of PW6 (the statements "I don't know" and "Taichu! Taichu!") and PW7 (the statements "That man! That man") after the caution were not admissible by reason of para. (b) to the proviso of sub-s. (1) of

s. 37A of the DDA. And the same applies to all gestures made by both the accused. For the word "statement" in the said para. (b) to the proviso would also, in my view, include gestures like the nodding of heads by both the accused (when asked by PW6 as to whether they understood English), the act of pointing a finger by the first accused at the second accused, and the act of making gestures with her hands and pointing to the door by the first accused while she was body searched (*Lee Lian & Ors. v. PP* [1956] MLJ 191; and *Lim Kah Wan v. PP* [1985] 2 CLJ 473).

In submitting that there was no *prima* case to answer, Encik Shanmugaiah contended that, on the evidence as adduced by the prosecution, the first accused should have been only charged under s. 21(6) of the DDA. He urged the court to amend the charge accordingly. The provision reads:

> 21 (6). Any person who brings any dangerous drug into Malaysia in transit otherwise than in accordance with the provisions of this section shall be guilty of an offence against this Act, and shall be liable on conviction to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding five years or to both.

Learned counsel argued that the first accused and the heroin were in transit because of the following factors –

(a) the heroin was brought into this country from Thailand;

(b) a visa to travel to Indonesia had been obtained on 6 May 1997 by the first accused from the Indonesian Embassy in Bangkok, and this was endorsed on her passport;

(c) the first accused was on her way to Penang;

(d) From Bukit Kayu Hitam, the nearest point of exit to Indonesia was from Penang;

(e) she had an air ticket (P15B) issued on 6 May 1997 to travel from Bangkok to Haadyai, date of flight being 6 May 1997.

Learned counsel referred to the definition of "in transit" in s. 2 of the DDA. It reads:

> "in transit" means taken or sent from any country and brought into Malaysia by land, air or water (whether or not landed or transhipped in Malaysia) for the sole purpose of being carried to another country either by the same or another conveyance;

PP v. Jorge Enrique Pedlow Tellow [1998] 4 CLJ 278 was cited in support of the contention.

In the light of the above definition, it is incumbent upon the defence to convince the court that on the evidence the heroin found was "for the sole purpose of being carried to" Indonesia in order to succeed in the contention. With respect to the counsel, there is hardly any evidence to show that the heroin was brought into Malaysia for the purpose of being carried to Indonesia, let alone for the sole purpose. The visa endorsed on the passport of the first accused by the Indonesian Embassy in Bangkok on 6 May only goes to show an intention on her part to travel to Indonesia. The visa referred to the holder of the passport only: it had nothing to do with the heroin. Based on the visa alone, it is far fetched to argue that the heroin was meant to be taken to Indonesia. There was no nexus between the visa and the heroin. As for the air ticket, in the first place, it was not even an air ticket to travel to Indonesia. It was a ticket to travel from Bangkok to Haadyai. Even then, at the time of arrest the date of the flight had passed: the date of the flight was 6 May whereas the first accused was arrested on 7 May. Further, geographically or legally speaking, in order to go to Indonesia from either Bangkok or Haadyai, there was no necessity for the first accused to enter Malaysia first. The testimony of PW5 (the immigration officer on duty at the Bukit Kayu Hitam immigration checkpoint at the material time and who had examined and endorsed the first accused's passport) further weakens Encik Shanmugaiah's contention. For this witness had said that he had made a "Social Visit Pass" endorsement on the first accused's passport (as well as on the passport of Molefe) and by such an endorsement the first accused was permitted to enter and remain in West Malaysia and Sabah until the date specified in the passport. He added – and this is pertinent - that the endorsement was not considered as a transit endorsement. As for the case cited, the facts in *Jorge Enrique* were materially different.

The first accused in her defence elected to give evidence under oath. She said that she was a widow with five children. She was a businesswoman from Lagos, Nigeria and had a place of business there. The nature of the business was buying and selling children's clothing. She left Nigeria for Bangkok on 29 April 1997. She travelled by Swissair via Zurich and arrived in Bangkok on 1 May 1997. She had a return ticket. Upon arrival in Bangkok, she checked into a hotel and went out to look for children's clothing. She had US$5,000 in cash with her. Each time she bought the clothing she would hand them over to a cargo handler to be sent by air back to Nigeria. It was the practice, she claimed, for the cargo handler to keep her passport.

She said that, one day, while she was shopping around, the second accused approached and befriended her. Introducing himself as "Titus", he told her that the clothing that she bought in Bangkok was expensive. He offered to take

her to Indonesia where such clothing was cheaper, and she agreed. She went to the cargo handler to get back her passport but the latter refused to give it back to her. The second accused told her that he could get her another passport. He asked and took US$500 from her to "process" the passport and for purchasing the air ticket to Indonesia. She never saw the ticket. They took a taxi to Bangkok airport but when they arrived there, the plane had already departed. The second accused suggested that they should take a bus. So they took a taxi to return to Bangkok city and there at approximately 6 p.m. they boarded a bus. While travelling on board the bus she carried a handbag (P10), while the second accused carried a travelling bag.

At approximately 9 a.m. the following morning they arrived at a town. She did not know the name of the town. There, all the passengers alighted. The second accused handed her a plastic bag to carry. She asked him about the contents of the bag and was told that it contained "shaving powder". She put the plastic bag inside her handbag.

At that town they boarded a taxi and the second accused told the first accused that they were heading towards a "border town". The former also told her that there were many thieves at the border town and that she should take out everything that was in her bag and hide them underneath her dress. So she took the five packages that was given to her by the second accused as well as her money from her handbag and hid them under her dress. The second accused then gave her a pair of slippers and said it was a sample to be taken to Indonesia. He asked her to put on the slippers to test whether they fitted her. As she was trying the slippers, they arrived at the border town. The slippers did not fit her.

At the immigration checkpoint, the second accused handed their passports to the immigration officer. After clearing immigration, they proceeded by the same taxi to the customs checkpoint. When they got off the taxi for the customs check, she saw the second accused "shivering". At the customs checkpoint, the customs officers took them into an office. The officers took the slippers and examined them; and she immediately told them that they belonged to the second accused who gave them to her. A woman customs officer checked her body and took away the packages. She alleged that the woman customs officer also took her money, cash US$1000, from her body. The first accused said she pointed to the second accused and said, "Titus, you are the one who gave them to me."

From the customs office they were taken to a police station. The first accused said that at the police station she slapped the second accused and they had a quarrel.

From the police station, they were taken to a prison. At the prison she again slapped the second accused, and she also hit him with his shoes, at the same time telling him, "You put me into trouble. You put me into trouble." She claimed that PW6 was present when she uttered these words.

The first accused denied having knowledge that the slippers and packages contained heroin. She said that in Nigeria it was common for men to use shaving powder when they shave.

When cross-examined by the DPP, the first accused said that in Bangkok she checked into a hotel known as The Nuri Hotel under the name "Afsat Ayoka Itowu". She stayed at the hotel for six days. When she decided to take the flight to Indonesia with the second accused, she did not check out from the hotel: she just left the hotel with the intention of returning to Bangkok. She spent five days of shopping in Bangkok and had spent US$3,500 on children clothing. When asked by the learned DPP, she claimed that she had never seen the passport P8 before.

The first accused called a woman by the name of (Miss) Ayoromi Helen (DW2) to be her witness. She testified that in Nigeria men used shaving powder to shave. She said that she could recall what happened on 7 May 1997. At around 4.30 p.m. she saw the first and second accused at the customs complex. When the customs officers recovered the packages from the body of the first accused, the latter started to cry, saying,

> Titus, you want to kill me. I have five children and you gave me drugs. You told me it was shaving powder. Would you do this to your sister or to your wife?

Then the first accused started to curse at the second accused. Thereafter she and the two accused were taken to a police station. At the police station, the first accused and the second accused continued to quarrel. From the police station, they were taken to a prison. There the first accused slapped the second accused and also beat him with a shoe.

I find that the evidence of the first accused raises many nagging questions and, above all, lacking in credibility. If her name was really (Mrs.) Msimanga Lesaly, why did she check at The Nuri Hotel under the name "Afsat Ayoka Itowu"? Why did she use a false name? Why didn't she check out of the hotel before leaving Bangkok for Indonesia? Why has she got to return to Bangkok from Indonesia? She did not explain why the cargo handler had to keep her passport. Her explanation as to why the cargo handler refused to return her passport is unconvincing. And as to the second passport that the second accused helped to procure, why didn't she keep that passport? Why didn't she ask the second accused as to how he could procure the passport that easy?

Why didn't she at least take a look at the passport and the air ticket? Why wasn't she suspicious of the second accused and the passport? She gave the impression that prior to the meeting in Bangkok, she had never met the second accused. Yet, how was it that, after only a brief acquaintance, she could readily believe him without questioning and without the slightest suspicion about everything that he said and did that involved her (such as getting her another passport without going through any formalities like filling in an application form and presenting herself at the Nigerian embassy or consulate in Bangkok)? She followed the second accused blindly and had never questioned him as to where and why he was taking her on a long overnight journey on land, by bus and taxi, after having missed the flight to Indonesia. If it was true that they had missed their flight to Indonesia, why didn't they just wait for the next flight (after all it takes only a few hours to fly to Jakarta from Bangkok)? Furthermore, if it was true that they had really wanted to go to Indonesia from Bangkok, why was it that none of the tickets recovered either from her or the second accused (P10A, P15A, P15B and P15C) showed any Indonesian destination (like Jakarta, Medan or Bali)? She tried – and in my judgment she failed miserably in her attempt - to portray herself as being either a naive or a daft person. It seems that she did not even know that she was in Haadyai when she arrived at that town (she merely mentioned "a town"); or that she was entering Bukit Kayu Hitam or the Malaysian border (she merely mentioned "border town"). She never at all mentioned about going to Penang. Is it possible for a businesswoman like her who could travel all alone on a business trip and all the way from Nigeria to Bangkok, yet at the same time could be so ignorant and gullible (perhaps, stupid would be a more appropriate word)? I do not believe that she was, in reality, that naive, ignorant or stupid as she attempted to portray herself in court. This portrayal of ignorance, naivety and stupidity by the first accused, to my mind, is nothing but a poor and desperate effort on her part to disassociate herself from the drugs and to put the blame solely on the second accused.

Then, again, if the slippers that the second accused asked her to try did not fit her, why did she continue to wear them when she alighted from the taxi at the immigration and customs checkpoints? After all, according to her, the slippers were merely samples to be taken by the second accused to Indonesia and that the latter had only asked her to "test" the slippers. What happened to the footwear of her own that she worn on that day?

The first accused was not good at lying in court. She had used a South African passport (P8) to obtain a visa to go to Indonesia on 6 May 1997, to leave (exit) Sadao, Thailand, on 7 May 1997 and to enter Malaysia on the same day through Bukit Kayu Hitam. Yet, in court, when cross-examined by the learned DPP, she could deny that it was her passport – despite her name and

photograph in it – and even went to the extent of alleging that the name "Ms. Lesaly Msimanga", described as the holder of the passport and the person to whom the Indonesian visa was issued, was not her name, and that the passport – the very document which she had used to enter Malaysia – belonged to the second accused! The fact that these allegations were only made during cross-examination only goes to show that they were nothing but mere afterthoughts.

As to the evidence of DW2, her evidence was very brief and hardly carried any weight. Claiming to be a businesswoman from Lagos, she did not explain why she entered Bukit Kayu Hitam from Thailand on the day in question; nor did she explain why she was arrested. She claimed to being present at the customs office at the time when the first accused was being searched, but neither the first accused nor any of the prosecution witnesses ever mentioned about her presence. Her presence at the office was also never suggested by the defence either to the prosecution witnesses or to the first accused when they were being cross-examined by the defence.

Her evidence is inconsistent with the evidence of the first accused. She said the first accused cried when the packages were recovered from her. But the first accused never said that she cried. Nor did any of the prosecution witnesses. According to DW2, the first accused said:

> Titus, you want to kill me. I have five children and you gave me drugs. You told me it was shaving powder. Would you do this to your sister or to your wife?

But the first accused never claimed to have said those words. According to the first accused, what she said was:

> A: I pointed to the direction of Titus and said, "Titus, you are the one who gave them to me."

DW2 was an evasive witness. This can be seen by the manner she answered the following questions put to her by the learned DPP during cross-examination:

> Q: What is your real name?
>
> A: Slifat. My name is only "Slifat".
>
> I have a passport.
>
> Q: What is your name in the passport?
>
> A: Slifat Musa.
>
> Q: Was your passport detained by the Customs Officer on 7.5.97?

A: I do not understand the question.

Q: When you entered Malaysia, did you bring along your passport?

A: Which passport, is it my original passport or the one that I used to come to Malaysia?

Q: Which passport did you bring to enter Malaysia?

A: I used the passport that was given to me by my friend.

Q: When were you born?

A: I cannot remember the date of my birthday.

Q: How about the year?

A: I cannot remember the year.

There is yet another matter. This witness, when she took the witness stand to affirm, stated that her name was "Miss Ayoromi Helen". However, when cross-examined, she gave her name only as "Slifat" and then as "Slifat Musa", as in her "original" passport – as claimed by her. This passport was never produced. But in the passport that she used to enter Malaysia, which was detained by the Customs on 7 May (P20), the name was written as "Helen Ayoromi". This passport, which she claimed was "given" to her by a friend, was purportedly issued by the Republic of Benin. To my mind this witness is a person of a dubious character who was prepared to use a fraudulent passport to enter this country. Her credibility, in my judgment, is highly suspect.

At the defence stage, the first accused sought once again to tender as evidence the written cautioned statement of the first accused *ie*, ID19. The learned DPP objected on the grounds that the court had earlier during the case for the prosecution already ruled the statement inadmissible. The defence, however, insisted, and this time they sought to introduce the statement through the recording officer DW3 whom the defence had called as a witness for the first accused. I decided to hold a trial-within-trial. At this trial-within-trial only DW3 testified. The first accused, the maker of the statement, elected not to give any evidence. At the end of the trial-within-trial, after hearing submissions, I ruled that ID19 was inadmissible. I was not satisfied that the first accused could satisfactorily communicate with DW3 in the English language. I was also not satisfied that DW3 had explained the caution satisfactorily to the first accused. This was an exceptional case because of the language problem. Thus, it was not sufficient for DW3 to merely say:

I explained the caution to her more or less in these words, that if she want to say anything, she can but if she does not want to say anything, it is still O.K.

The consequence of making a statement should have been explained.

At the defence stage, the first accused could have either –

(a) conceded that she was in possession of the heroin, and then sought to rebut the presumption of trafficking; or, alternatively,

(b) denied to be in possession of the drug, that is to say, to challenge the very foundation of the said presumption of law,

depending on the nature of the defence evidence to be adduced. If (a) was the nature of the defence, she had to rebut the presumption on a balance of probabilities. However, if (b) was the case, then, she needed only to raise a reasonable doubt (*Yong Su Wan v. PP* [1998] 3 CLJ 419 and *PP v. David Ackowuah Bonsu* [1999] 2 CLJ 677). In the instant case, from the evidence of the defence taken as a whole, it appears to me that the accused had sought to show to the court that she was never in possession of the heroin (*ie*, the defence was in the nature of (b)); for she had claimed that although the heroin was found in her slippers and on her body, she was not aware that the slippers had contained the drug, nor was she aware that the packages found on her body contained the same – she had thought that they were shaving powder.

At the end of the case for the defence, having carefully considered the whole evidence of the case and the submissions, and based on the grounds given above, I found that the first accused had failed to cast a reasonable doubt against the prosecution case. I was fully satisfied that the prosecution had proved its case beyond reasonable doubt. I found her guilty and convicted her of the charge. She was sentenced to death according to the law.

[Found guilty, convicted and sentenced.]